UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

PRATT INDUSTRIES, INC.,

Respondent

and

Case Nos. 29-CA-30271
29-CA-30281
29-CA-30382

INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 30

Charging Party

COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN ANSWER TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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Dated at Brooklyn, New York
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I. PROCEDURAL HISTORY OF THE CASE

The case was litigated before Administrative Law Judge Lauren Esposito on February 4, March 28, March 29 and March 30, 2011, in Brooklyn, New York. On August 30, 2011, Judge Esposito issued her Decision[1] in Case Nos. 29-CA-30271, 29-CA-30281 and 29-CA-30382, in which she found that Respondent committed numerous violations of the NLRA, as alleged in the Second Consolidated Amended Complaint, and as amended during the trial.

Specifically, the Judge found that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing certain terms and conditions of employment, which were mandatory subjects of bargaining (including reducing Unit employees' work hours, changing the work schedules of regular day-shift Unit employees; employing subcontractors to perform Unit employees' work, making various changes to employees' sick leave and call-in policies and practices, and by instituting a new disciplinary policy for Unit employees who failed to comply with the new sick leave and call-in policies) without bargaining to agreement or to a good faith impasse.

II. FACTS

All relevant and material facts have been completely and accurately set forth in the Administrative Law Judge's Decision (ALJD p. 2-11).

In her Decision, the ALJ presented a richly detailed account of all relevant factual findings. However, it is imperative to present a synopsis of the record evidence in this case because of Respondent's efforts to obfuscate the rather straightforward legal issues involved herein by positing red-herring arguments, and because of Respondent's disturbing pattern of misrepresenting the record evidence and conveniently omitting relevant facts and Respondent's own admissions that contradict its defenses.

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[1] References to the ALJ's Decision will be noted as "ALJD." "Tr." denotes references to the official transcript. "GC Ex.," "Resp. Ex." denote references to General Counsel's and Respondent's exhibits, respectively. "Resp. Br." refers to Respondent's exceptions brief.

As will become readily apparent by a review of the ALJ's decision and the record evidence, most critical and material facts are not in dispute. Indeed, when Respondent's unsubstantiated hyperbole is appropriately cast aside, it is evident that most critical facts were admitted, albeit often reluctantly or unwittingly, by Respondent's own witnesses. The only discrepancies in the account of relevant, material events stem solely from the spin Respondent's well-coached witnesses put on their testimony.

A. Respondent's Business Operation

Respondent is engaged in the business of recycling paper and manufacturing paper and cardboard boxes at its Staten Island facility (GC Ex. 1, Tr. 51, 178). Respondent's business operation is comprised of several departments. The production department runs the paper machines. The recycling department takes in mixed waste and converts the paper into pulp. The maintenance department handles mechanical duties such as welding. The warehouse department ships out the paper rolls and moves the paper rolls for storage. (Tr. 178)

The Electrical and Instrumentation ("E&I") technicians, the bargaining unit employees involved herein, are responsible for maintaining all electrical equipment (motors, agitators, transmitters) and all electrical instrumentation (Tr. 53-53, 226) and for providing the power to the motors in each of Respondent's four buildings (Tr. 178). After daily 15-minute meetings with their supervisor each morning, the E&I technicians get their work orders for the day and make their rounds to their assigned areas (Tr. 226). The E&I technicians install new equipment, repair and maintain equipment and respond to emergencies or issues that arise during their work day. The E&I technicians also maintain and repair the motors and emergency lights throughout the facility (Tr. 181). The undisputed record evidence establishes that for years, E&I technician Gary Stern was responsible for maintaining and repairing the emergency lighting throughout the facility. The undisputed evidence establishes that Joseph Hamilton was responsible for maintaining the inventory of motors for the machinery (Tr. 181).

B. Respondent's Management Personnel

At all material times, Vic Columbus has been Respondent's chief spokesperson for Human Resources and was Respondent's chief negotiator during collective bargaining between Respondent and the Union.

Keelie Cruz has been Respondent's Human Resources Regional Manager since February 2008, and in that capacity, has been responsible for human resource functions (Tr. 459). Cruz attended the parties' bargaining sessions and took bargaining notes at many meetings.

Jay Hennessey has been Respondent's General Manager of the mill for five years (Tr. 526). He attended bargaining sessions on Respondent's behalf.

Mark Mays has been Respondent's engineering manager in the Electrical and Instrumentation (E & I) department for two and one half years (Tr. 499). Respondent's E&I department supervisors report directly to Mays (Tr. 500).

At all material times, Mike Austin and Kevin O'Rourke have been supervisors of Respondent's electrical and instrumentation technicians. From at least September 2009 to June 2009, the E&I technicians were supervised by Kevin O'Rourke (Tr. 178). During the period from June 2009 to the date of the trial, the E&I technicians were supervised by Mike Austin. Respondent did not call either Mike Austin or Kevin O'Rourke to testify during the trial.

C. The Union Representative

Since September 2008, Kevin Cruse has been the Union's Field Representative, responsible for Manhattan, Staten Island, Brooklyn and Queens. As Field Representative, Cruse is responsible for negotiating contracts and handling grievances. Cruse testified that at the time of the hearing, he was responsible for 58 collective bargaining agreements. During the period from September 2009 up to the date of the trial, Cruse was involved in negotiating over 40 collective bargaining agreements (Tr. 282-283).

D. The Electrical and Instrumentation Technicians

At all material times, Respondent employed seven E&I technicians, including: Darren Kologi, Joseph Hamilton, John O'Donnell, Robert McIntosh, Roberto Cedeno, Gary Stern and Larry Dobson[2].

Darren Kologi has been employed by Respondent since November 1998 as a controls engineer in the E&I department (Tr. 50). Kologi has been a member of the Union since September 2009 and since that time, has been one of the two shop stewards (Tr. 51). Kologi attended most of the parties' bargaining sessions on behalf of the Union.

Joe Hamilton has been employed by Respondent for over five years as an electrical and instrumentation technician in Respondent's E&I Department. Hamilton has been a member of the Union since September 2009 and since that time, has been a shop steward. Hamilton attended all of the collective bargaining negotiations from September 28, 2009 to June 2010, and also attended most sessions thereafter (Tr. 227).

John O'Donnell has been employed by Respondent as an electrical and instrumentation technician for over ten years (Tr. 177). O'Donnell is a member of the Union but is not a shop steward. O'Donnell did not attend the bargaining sessions.

E. The Collective Bargaining History Between Respondent and the Union

On September 28, 2009, after the conduct of an election, the Union was certified as the exclusive collective-bargaining representative of the bargaining unit of Respondent's electrical and instrumentation technicians employed at its Staten Island facility (GC Ex. 1).

Respondent and the Union began collective bargaining for an initial collective bargaining agreement immediately upon the Union's certification. During the period of time from the September 28, 2009 certification and Respondent's June 2010 unilateral implementation of changes to employees' terms and conditions of employment involved herein, the parties met and

[2]Larry Dobson left Respondent's employ in or about mid-June 2010, after Respondent changed E&I technicians' work schedules and reduced their hours.

bargained for an initial collective bargaining agreement seven times[3], on September 28 and 29, 2009, November 11, 2009, December 16, 2009, January 20, 2010, February 24, 2010 and April 21, 2010.

Bargaining on behalf of Respondent was Vic Columbus, Respondent's main negotiator, assisted by Mark Mays, Keeli Cruz and Jay Hennessey (Tr. 284). Present at negotiations for the Union were Field Representative Kevin Cruse (the Union's lead negotiator) and E&I technicians Darren Kologi and Joe Hamilton (Tr. 284).

At the start of the first bargaining session on September 28, 2009, Kevin Cruse distributed the Union's initial contract proposals to Respondent. Cruse read and explained each of the Union's proposals (Tr. 298). During the course of bargaining, the parties worked from the Union's proposals and Respondent's counter proposals (Tr. 298). Cruse noted on his copies whether items had been agreed to, withdrawn or kept in the proposal for further bargaining.

Included among the Union's initial contract proposals (dated September 25, 2009) was the Union's proposal to increase paid sick days from three to ten per year (Tr. 298, GC Ex. 32). Vic Columbus rejected this proposal; instead, in Respondent's "Counter Proposal #1," dated September 28, 2009 (under the heading, "Additional Company Proposals) Respondent proposed to reduce sick days from three to zero per year (Tr. 299, GC Ex. 33).

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[3] Throughout its Brief, Respondent repeatedly mischaracterizes and distorts the undisputed record evidence regarding the length of the parties' collective bargaining before Respondent's unlawful implementation of changes involved herein. For example, Respondent states that the parties bargained from September 2009 through the hearing date of March 2011 (Resp. Br. p. 2), claiming that the parties met "nine times in 18 months" (Resp. Brief p. 2). Respondent claims that there was no significant movement on major issues "in 18 months." (Resp. Br. p. 3). Respondent is essentially fabricating "facts" to concoct a defense to its unlawful implementation,- because the fact that there were few bargaining sessions supports the Judge's finding that the parties *were not* at impasse when Respondent implement the changes in June 2010.

Contrary to what Respondent would like the Board to believe, as of Respondent's June 10, 2010 implementation, the parties had face to face bargaining sessions seven times – *not* 18. As the ALJ correctly noted, Board law holds that particularly in the context of a first contact, limited number of bargaining sessions prior to implementation belies the contention that the parties were at impasse. ALJD p. 13. As the ALJ further correctly noted, Board law requires that Respondent demonstrate that impasse existed *at the time of its June 2010 changes*, and that impasse occurring after unilateral implementation of Respondent's proposals is irrelevant. ALJD p. 13, ln, 1-4.

In addition to proposing to eliminate paid sick leave, Respondent's Counter Proposal #1 establishes that Respondent proposed to remove employees' ability to use vacation days as sick days[4] (Tr. 300, GC Ex. 33). The Union did not agree to these proposals. Cruse testified that at no time during bargaining did Respondent make any other proposals to change current practices or rules regarding employees' use of sick days (Tr. 301). None of Respondent's witnesses contradicted this testimony.

The Union also included among its initial proposals a Union referral provision, stating that the Union wanted the opportunity to provide Respondent with candidates for consideration when Respondent was hiring (Tr. 301-302). Cruse testified that the parties discussed the Union referral proposal during several bargaining sessions. For example, Cruse testified that he explained that the Union would not require Respondent to hire through the Union, but that the Union wanted the opportunity to provide qualified candidates for Respondent to consider. Respondent rejected the Union referral proposal. The Union kept its Union referral proposal in its contract proposals.

Respondent's Counter Proposal #1 also conclusively establishes that as of September 28, 2009, Respondent had agreed to the Union's proposal to pay the E&I technicians on a weekly basis (instead of on a bi-weekly basis, as they had been paid) -three months before Respondent announced its proposed schedule change. (GC Ex. 33). This was admitted by Respondent's witnesses Columbus and Mays (Tr. 427, 525).

Respondent admits that at no point during the course of bargaining did Respondent discuss or make any proposal regarding Respondent's subcontracting out bargaining unit work (Tr. 305-306). In addition, Columbus admitted that Respondent never raised the issue or made

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[4] It is noteworthy that the sick leave policy Respondent implemented on June 9th was different than this sick leave policy that Respondent proposed during bargaining. The June 9th memo stated that employees who used their three accrued sick days will be required to use single vacation days to make up for the absence as long as a sick note is provided. (GC Ex. 5).

any proposals regarding employees' call-out procedures, unexcused absence policies, including employees' use of unpaid days to cover leave, requiring employees to provide doctor's notes to document absences or any changes to Respondent's disciplinary policies or new grounds for disciplining unit employees (Tr. 446-447).

After Respondent issued its June 9, 2010, Memos to unit employees (GC Ex. 3, 4, 5), in which it announced and implemented changes to employees' terms and conditions of employment, the evidence establishes that the parties continued to meet and bargain for an initial contract. The undisputed evidence establishes that the parties had bargaining sessions on October 19 and 20, 2010, and January 10, 2011.

III. ARGUMENT

A. The ALJ's Credibility Determinations Should Be Affirmed

Respondent argues that the Judge erred in crediting the testimony of Union representative Cruse (Resp. Br. p. 19). Respondent essentially argues that Cruse's testimony was not always corroborated by the Union's bargaining notes.

It is axiomatic that the Board gives broad deference to and will not overturn an administrative law judge's credibility findings unless it is convinced by a clear preponderance of the evidence that those credibility resolutions are incorrect[5]. Respondent failed to meet this burden of proof. Respondent's argument is wholly without merit and must be rejected.

First, contrary to Respondent's claim, the Judge did not base her findings about what took place during bargaining solely on the testimony of Cruse. It is plain that the ALJ made her credibility findings regarding what took place during the parties' face to face bargaining sessions based on the entire record evidence, her observations of the demeanor of the

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[5] *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951); *Upper Great Lakes Pilots, Inc.*, 311 NLRB 131 (1993); *Storer Communications, Inc.*, 297 NLRB 269, fn.2 (1982).

witnesses while testifying (ALJD p. 3, ln. 18-19), and her evaluation of the reliability of their testimony. A review of Judge Esposito's decision reveals that her credibility findings are well supported by the record.

In reaching her findings of fact of what took place during bargaining, the Judge credited the testimony of Cruse, Kologi and Hamilton. General Counsel's witnesses' testimony about bargaining was richly detailed and forthright. In contrast, the Judge found, as is supported by the record, that Columbus' testimony was not factually specific or detailed, that Columbus testified about Respondent's intent during bargaining rather that what the parties actually said, and that Columbus admitted that he could not recall what was said during negotiations. ALJD p. 4, fn.3.

The Judge also correctly credited the testimony of Kologi, Hamilton and O'Donnell and discredited that of Keelie Cruz regarding whether Respondent changed its sick leave policies. ALJD. p. 16, ln. 30-35, p. 17, fn.16. The Judge was correct in crediting the E&I technicians, all of whom are long-tenured employees, regarding their experience of Respondent's practice when they called in sick after using their accrued sick days. Their testimony was detailed and corroborative. In contract, Cruz was exposed as being willing to say what she was coached to say, regardless of the truth, regarding matters to which she had no personal knowledge. Moreover, as the E&I technicians' testimony is entitled to added weight in all respects, as they were still in Respondent's employ when they testified adverse to Respondent's interests. See, *Traction Wholesale Center Co.*, 328 NLRB No. 148 (1999), citing *Weis Markets, Inc.*, 325 NLRB 871, 894 (1998).

It is evident that the Judge's credibility determinations were reached after careful consideration of the witnesses' demeanor and after weighing the entire record evidence. Because Respondent failed to demonstrate by a clear preponderance of all relevant evidence that the Judge's credibility findings are incorrect, the Board should affirm each of Judge Esposito's credibility determinations.

B. The Record Evidence and Well-Settled Board Law Overwhelmingly Support The ALJ's Finding That During The Course Of Bargaining For An Initial Contract, And Before Reaching An Overall Impasse, Respondent Unilaterally Changed Unit Employees' Work Schedules And Reduced The Number Of Scheduled Work Hours, In Violation Of Section 8(a)(5) Of The Act

1. It Is Undisputed That On June 20, 2010, Respondent Changed Employees' Work Schedules And Reduced The Number Of Scheduled Work Hours

The ALJ correctly found that before June 20th, the E&I technicians worked 4-days per week and a total of at least 44 scheduled hours per week[6] (ALJD p. 3, p.4). As the Judge noted, Respondent does not dispute that on June 20th, pursuant to one of Respondent's three June 9, 2010 memos to E&I employees, Respondent changed the E&I technicians' work schedules to 5 8-hour days per week and reduced their scheduled work hours from 44 hours per week to 41.25 hours per week (Tr. 186, 187)[7]. (ALJD p. 4)., technicians (GC Ex., Ex. 15).

During the June 20th meeting, Mike Austin read the three memos aloud to the E&I techs[8] (Tr. 184). The Schedule Change memo states, in relevant part, "In order to conform to the business needs of the Mill production environment, we are implementing new schedules for the E&I Department effective Sunday, June 20, 2010[9]" (GC Ex. 3). The undisputed evidence

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[6] Kologi, O'Donnell and Hamilton's scheduled hours were reduced from 44 hours per week to 41.25 hours per week; other unit employees' scheduled hours were reduced in varying amounts (Tr. 186, 187, GC Ex. 3, GC Ex. 15). In addition to substantially impacting unit employees' schedules and hours, the uncontradicted record testimony further establishes that Respondent's schedule changes and reduced scheduled work hours also reduced the number of hours of employees' paid vacation pay, sick pay and holiday pay accrued by unit employees (Tr. 66-67, 231).

[7] John O'Donnell testified that before June 20th, he worked Mondays, Tuesdays and Thursdays from 7am to 7pm, Wednesdays from 7am to 3pm, and was off on Fridays, Saturdays and Sundays (Tr. 182). Joe Hamilton testified that before the June schedule changes, he worked Mondays for 12 hours, Wednesdays for 8 hours, and Thursdays and Fridays for 12 hours, with alternating Tuesdays and Thursdays off (Tr. 228).

[8] During this meeting, Respondent distributed to employees three memos, entitled "Schedule Change" (GC Ex. 3), "Call Out Procedure (GC Ex. 4) and "Unexcused Absences" (GC Ex. 5), announcing changes to those work rules, which will be discussed below.

[9] Pursuant to the Schedule Change Memo, Darren Kologi was assigned to the day first shift (7am to 3pm), Joe Hamilton was assigned to the day second shift (9am to 5pm) and John O'Donnell was assigned to the day third shift (11am to 7pm). The new schedule also made employees Bob McIntosh, Gary Stern, Ramon Cedeno and Larry Dobson shift workers, requiring them to work weekends and nights, in addition

establishes that the work shifts set forth on the June 9th memo did not exist at the facility prior to this meeting (Tr. 185).

The uncontradicted evidence further establishes that the schedule changes and work hour reduction that Respondent implemented on June 20th was different that the last proposal made by Respondent during bargaining. In that regard, the schedule that Respondent announced in its June 9th memo had each E&I technician working a fixed shift. The evidence establishes that the work schedule proposed by Respondent during the April 21st bargaining session, the last session before Respondent implemented the schedule changes, had technicians rotating among the newly created shifts. (Tr. 135).

2. The ALJ Correctly Found That There Was No Impasse When Respondent Implemented Its Changes

In its Exception No. 1, Respondent argues that the ALJ erred by failing to find that the parties were at impasse when Respondent implemented "portions of its most recent offer in June, 2010." Respondent's argument boils down to one claim - that the parties were at impasse because there was no significant movement on major issues, to which the ALJ failed to give sufficient weight[10]. Respondent does not rely on any other factor to support its claim of impasse. Respondent puts its head in the sand and simply ignores all of the other factors relied on by the Board in determining whether there was an impasse.

In its Exception No. 2, Respondent contends that in finding that the parties were not at impasse, that the judge relied **only** on one factor, namely whether both parties agreed that they

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to working some days[9] (Tr. 186).

[10] While there was no agreement on many major issues, Respondent's claim that there was no significant movement is inaccurate. As noted and fully supported by the ALJ and as shown below, the undisputed evidence establishes that in the bargaining sessions just before Respondent's June implementation, the parties had rolled up their sleeves and were deeply immersed in the work of bargaining over economic issues. The parties were exchanging economic proposals and were exchanging information to help explain their economic proposals.

were at impasse. This claim is patently untrue. Respondent misrepresents the Judge's decision and completely ignores her clearly articulated and well supported analysis of all factors relied on by the Board for finding that the parties were not at impasse. Respondent's claim that the Judge relied on only one factor is ironic, as it is clear that it is Respondent who relies on one factor, that there was no significant movement on important issues – to the exclusion of the all other factors analyzed by the Board when determining whether an impasse had been reached.

Respondent's claims are wholly contradicted by the record evidence. Its argument do not withstand scrutiny when analyzed in light of the record and well-established Board law.

It is well-settled Board law that where, as here, the parties are engaged in collective bargaining negotiations, Respondent may not make unilateral changes in mandatory subjects of bargaining without first bargaining to a valid impasse. *NLRB v. Katz*, 369 U.S. 736 (1962). While negotiations for a collective-bargaining agreement are ongoing, "an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole." *Master Window Cleaning, Inc., d/b/a Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enf'd. mem. *Master Window Cleaning, Inc. v. NLRB*, 15 F3d 1087 (9th Cir. 1994); *Eugene Iovine, Inc.*, 356 NLRB No. 134 (2011). The Board has identified two limited exceptions to this rule that otherwise clearly precludes Respondent from unilateral implementation: "[w]hen a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining, and when economic exigencies compel prompt action." *Id.*, and cases cited therein.

Board law is clear that an impasse occurs when good faith negotiations reach the point at which the parties have exhausted the possibility of concluding an agreement and both parties believe that further discussions would be fruitless. *Metro Mayagues, Inc., d/b/a Hospital Perea*, 356 NLRB No. 150 (2011); *Area Trade Bindery Co.*, 352 NLRB 172, 175 (2008); *Eugene Iovine*, supra. Good faith bargaining requires notice and a meaningful opportunity to bargain to

Iovine, 353 NLRB 400. Good faith bargaining requires notice and a meaningful opportunity to bargain to an employer's proposed changes, and no impasse is possible where an employer presents the Union with a 'fait accompli' as to a matter over which bargaining to impasse is required. *Id.*, citing *Dorsey Trailers, Inc.*, 327 NLRB 835, 858 (1999).

The question of whether a valid impasse exists is a "matter of judgment." In determining whether the parties have reached impasse, the Board considers the totality of the circumstances and analyzes several factors, including: the bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations. *Taft Broadcasting Co.*, 163 NLRB 475, 487 (1067), enf'd. sub. nom.

As the party asserting this defense, it is Respondent's burden to prove that the parties reached a valid, good faith impasse. *Serramonte Oldsmobile, Inc.*, 318 NLRB 80, 97 (1995). Respondent utterly failed to meet this burden. To the contrary, the record evidence overwhelmingly contradicts Respondent's claim that the parties reached impasse[11].

Respondent distorts the Judge's Decision by claiming that she found no impasse based only on the parties' understanding. Contrary to Respondent's absurd claim, it is evident that the Judge analyzed, weighted and thoughtfully considered *all* factors under Board law regarding impasse. In that regard, the judge correctly considered the important fact that as of June 20th, when Respondent unlawfully implemented the changes, the parties had only met a few times. ALJD p. 13. The judge also correctly considered that under Board law, where the parties are negotiating a first collective bargaining agreement, the limited number of bargaining sessions belies Respondent's claim of impasse. ALJD p. 13. The judge also relied on the undisputed evidence that at the April 21st session, the last session before Respondent implemented, the union

[11] During the investigation of the instant unfair labor practice charges, Respondent did not contend that it was privileged to implement the changes to employees' terms and conditions of employment because the parties reached a valid impasse. (GC. Ex. 69). Respondent raised this argument for the first time during trial.

modified its proposals regarding sick time and made a new proposal in response to Respondent's schedule change proposals. ALJD p. 13. The judge correctly held that the union's modified proposals showed the union's willingness to compromise, thus undermining Respondent's claim of impasse.

In finding no impasse, the Judge also correctly relied on the undisputed evidence that as of the last bargaining session before Respondent's June implementation, on April 21st, the parties were engaged in serious bargaining focused on the economics of a contract until January 2010, and that this focused bargaining on economics continued up until (and after) Respondent's June 2010 implementation of schedule changes. For example, by email dated March 15, 2010 from Cruse to Columbus, Cruse presented the Union's economic proposal. Columbus asked Cruse to share his calculations (GC Ex. 44). On March 16th, Columbus responded via email entitled, "Costing it Out," in which Columbus presented Respondent's view of the cost of the Union's proposals (GC Ex. 20). By email dated March 18th to Columbus, Cruse explained to Respondent the Union's explanation of the basis for its cost of its proposals (GC Ex. 45), and on March 19th, Cruse emailed Columbus the Union's breakdown of costs (GC Ex. 46). In addition, in Columbus's April 23rd email to Cruse, Columbus forwarded Respondent's version of cost calculations, with explanations, and requested that Cruse review and comment (GC Ex. 22). In light of this uncontradicted evidence that the parties were immersed in bargaining over economics, the ALJ correctly found that the parties were not at impasse.

Respondent seems to be arguing that the parties' contemporaneous understanding regarding whether fruitful negotiations were possible does not matter at all. This claim is disingenuous and absurd, and flies in the face of well-settled Board law. First, the ALJ was correct in analyzing this, among other, factors in finding no impasse. Next, the record evidence –

most notably Vic Columbus' own admissions - compels the conclusion that neither party believed that they were at impasse[12].

Respondent's specious claim of impasse is fatally contradicted by the testimony of Respondent's own witnesses. As the Judge noted, at no time did Respondent present the union with a last and final offer. ALJD p. 13, ln. 9-14. In fact, Columbus, Respondent's key witness and chief negotiator, admitted that at ***no*** point during contract negotiations did Respondent present the Union with Respondent's "last and final" offer, testifying that "other than the schedule we were going to implement, no," Respondent had not presented the Union with a last and final offer. (Tr. 436).

The ALJ correctly considered that no party ever declared impasse. ALJD p. 13, ln. 9-11. Columbus admitted that Respondent never declared, either verbally or via email or letter, that the parties were at impasse. Columbus testified that neither at the conclusion of the January 20th meeting 2010, nor at the February 24th session, and most importantly, not at the conclusion of the April 21st bargaining session, the last session before Respondent implemented its June 2010 changes, did Respondent declare impasse (Tr. 435). Columbus further admitted that at no time after the April 21st bargaining session and before Respondent's June 20th implementation of its schedule change did he email or telephone Kevin Cruse to advise the Union that Respondent believed that the parties were at impasse (Tr. 436).

Furthermore, Respondent presented no evidence of statements by the Union that would substantiate the claim that there was no further progress possible.

Significantly, and consistent with the overwhelming evidence that the parties were continuing to exchange proposals and bargain in depth regarding the economics of an agreement, Columbus further admitted without hesitation that at the conclusion of the January, February and

[12] Throughout Respondent's exceptions brief, it repeatedly argues that Respondent was always willing to meet with the Union and that its willingness to meet and bargain was laudable. Clearly, this is an admission that Respondent did not believe that continued bargaining was fruitless, and, therefore, the parties were not at impasse.

April 21st bargaining sessions, he believed that the parties were still bargaining (Tr. 435). Further supporting the conclusion that the parties were not at impasse, Columbus admitted that after the parties' April 21st meeting, he was busy preparing counter proposals in preparation for the next bargaining session. Columbus further admitted that after the April 21st meeting, Respondent and the Union had agreed to additional bargaining sessions on May 12th, May 26th and June 9th and continued to prepare for bargaining sessions (Tr. 443). In that regard, Columbus admitted that he sent his May 24th email to Cruse in anticipation of the parties' next scheduled bargaining session (Tr. 436, GC Ex. 54). Columbus further admitted that the Union had presented Respondent with updated contract proposals, which Columbus reviewed, and that Columbus prepared a new set of Respondent's counter proposals in response, which he distributed to his managers via email on June 9th for their review and comments in preparation for the parties' scheduled bargaining session on June 9th. (Tr. 436-437, GC Ex. 23). Clearly, the parties had not reached impasse but were earnestly engaged in bargaining – as Respondent knew.

The evidence regarding the parties' post-June implementation conduct also supports the Judge's finding that the parties were not at impasse. Specifically, numerous emails between Columbus and Kevin Cruse ***after*** Respondent's June 2010 implementation of changes establish that the parties did not believe that bargaining had reached a deadlock and, instead, were planning to continue to meet and bargain. One such example is a July 29, 2010 email from Columbus to Kevin Cruse, in which Columbus wrote that he was coming to New York on August 24th and 25th, noted that the parties had to discuss E&I negotiations, and asked Cruse when he wanted to meet and whether Columbus should plan to stay longer (GC Ex. 55). Notably, Respondent did not contact the Union stating that it wished to *break* the previous impasse and resume bargaining. Rather, the communication from Columbus to Cruse clearly indicates that the parties were continuing their unbroken negotiation process.

Respondent cannot seriously and in good faith claim that Columbus' admissions - that the parties were exchanging proposals, exchanging information on the economics of the contract, scheduling dates to meet and that he believed that the parties continued to be engaged in fruitful negotiations – is not relevant. In the face of Columbus' admissions that the parties were preparing and exchanging contract proposals, Respondent's claim of impasse is preposterous. The ALJ was correct to consider, among all of the factors that she analyzed, Columbus' admissions that the parties were still bargaining when Respondent unilaterally implemented its changes in June 2010. ALJD p. 13, ln. 7-22.

Based on the above, it is beyond question that Respondent failed to meet its burden of proving that the parties reached a valid, overall impasse. To the contrary, the record evidence necessarily compels the inescapable conclusion that no impasse existed and that the parties were still actively bargaining when Respondent unilaterally changed employees' work schedules and reduced scheduled work hours on June 20th.

3. The ALJ Correctly Found That Respondent Failed To Prove The Limited Exception To *Bottom Line Enterprises* That Would Privilege Unilateral Changes Because The Union Engaged In A Pattern Of Delay To Avoid Bargaining

In her Decision, the ALJ correctly found that the evidence does not support Respondent's claim that it was privileged to implement schedule changes and reduce employees' scheduled work hours because the Union engaged in a pattern of delay to avoid bargaining. ALJD p. 14, ln. 29-52, p. 14, ln. 1-7. The Judge's finding is overwhelmingly supported by the record evidence and by Board law.

Respondent attempts to support its ridiculous claim that the Union avoided and delayed bargaining by nothing but hyperbole and untruths. Respondent's contention that the Union delayed or avoided bargaining is plainly contradicted by the probative record evidence.

While there is evidence that the Union cancelled some bargaining sessions, Respondent failed to prove that the Union engaged in a pattern of continuous delay or that the Union

cancelled any bargaining sessions in order to impede the progress of bargaining. In that regard, the record evidence overwhelmingly establishes that the Union and Respondent were in regular contact about scheduling bargaining sessions. (GC Exs. 37, 39, 43, 48-51, 54-55, 57-62, 64-66).

Several emails in particular clearly show that Respondent's specious claim that the Union was avoiding bargaining is patently false. Specifically, in an email dated October 13, 2009 from Cruse to Columbus, Cruse requested that the parties meet every Wednesday (GC Ex. 37). In Cruse's March 29, 2010 email to Columbus, Cruse asked Columbus to provide the Union with dates for bargaining that are not a month apart, as in the contract negotiations regarding the papermakers, where Respondent scheduled bargaining on consecutive days (GC 48). In addition, later in the same email exchange, Cruse requested that Respondent meet every Wednesday (GC Ex. 48). In a March 31st email to Columbus, Cruse suggested that the parties negotiate via conference calls if Columbus was having difficulty meeting in person (GC Ex. 48).

In its brief, Respondent tries to suggest that any cancelled or rescheduled meeting by the Union shows that the Union was avoiding bargaining. However, Respondent conveniently ignores the evidence (which the Judge did not, ALJD p. 14, ln. 3545) that when the Union had to cancel or reschedule negotiations, it provided Respondent with legitimate reasons. One such example, of many, is established in Columbus's May 24th email to Cruse in which Columbus acknowledged that Cruse had to reschedule a previously scheduled meeting because Cruse was under subpoena (Tr. 436, GC Ex. 54).

In addition to proving that the Union did not delay or avoid bargaining, the evidence further establishes that the Union's conduct was not any different than Respondent's. In that regard, the evidence also shows that on occasion, Respondent did not confirm meetings and that it cancelled meetings. For example, contrary to Respondent counsel's claim, Cruse testified that the Union did not cancel meetings on December 2nd and December 9th, 2009, but that Respondent had not confirmed those meetings (Tr. 335). In an April 22nd, email from Columbus to Cruse, Columbus advised that he had a conflict with the May 12th date that the parties had scheduled and

requested alternative dates (GC ex. 49). In addition, Cruse testified that a bargaining session had been scheduled for December 6th, but that Vic Columbus did not show up (Tr. 339). Darren Kologi corroborated that Respondent cancelled meetings (Tr. 101, 107).

In support of its disingenuous defense, Respondent tried to accuse the Union of canceling seven meetings scheduled *after* Respondent had implemented its changes. Even if this were true, it would not justify Respondent's unilateral conduct[13]. Nonetheless, the evidence establishes that there was a legitimate reason for rescheduling. Cruse testified that on August 11, 2010, the Union accepted seven dates for bargaining but that on August 13th, the Union cancelled those dates (Tr. 338). Respondent's counsel cut Cruse off when he tried to explain the reason for these cancellations (Tr. 338). During re-direct examination, Cruse testified that in August, when Columbus had offered a block of dates for bargaining, Cruse first checked with unit employees and shop stewards Kologi and Hamilton to check their availability. Cruse testified that after initially agreeing to the dates that Columbus had proposed, Kologi notified Cruse that he had misread the employees' work schedule and that the proposed bargaining dates conflicted with the Kologi's and Hamilton's work schedules. Cruse testified that he then notified Columbus of the problem (Tr. 345-346). Thus, contrary to Respondent's counsel's false claim that the Union was avoiding bargaining, the parties' email exchanges clearly show that Cruse explained the reason for the need to reschedule the block of meetings. Furthermore, new dates for bargaining were agreed to.

Moreover, Cruse's uncontradicted testimony establishes that after Respondent changed the employees' work schedules, it became difficult to schedule bargaining sessions because of Kologi's and Hamilton's new work hours. In that regard, Cruse testified that before the June 20th

[13] Counsel for the Acting General Counsel submits that even if that were true, the Union's conduct after Respondent unlawfully made unilateral changes to employees' terms and conditions of employment is not relevant to the allegations herein and should not be considered. The only issue before the Board is whether Respondent proved that the parties were at a valid impasse at the time that Respondent implemented its changes.

schedule change, the Union scheduled most bargaining sessions for Wednesdays, because that was the day that Kologi worked an 8-hour (as opposed to his 12-hour) day, and because that was Joe Hamilton's day off (Tr. 346). Cruse testified that Respondent's schedule change made it more difficult to schedule bargaining sessions because bargaining often conflicted with Kologi's and Hamilton's work schedules (Tr. 346, GC Ex. 57 and 58). Respondent cannot, by its unlawful unilateral change to employees' work schedules, cause the Union's difficulty in scheduling negotiations and then use that as evidence that the Union was avoiding bargaining.

Respondent further tries to support its specious argument that the parties were at impasse by misrepresenting the record evidence and by distorting the Judge's findings. Respondent argues that the judge did not "mention" that the parties did not meet to bargain between April and October, falsely calling this a "hiatus" in bargaining and falsely claiming that the Union "refused to schedule a meeting" from April to October (Resp. Br. P. 4). This is blatantly untrue. Respondent provided no citation to record evidence to support this untruth – because there is no record evidence to support it. Moreover, Respondent's red-herring argument is unavailing because it is contradicted by the record evidence and by well-settled Board law.

The evidence establishes that Respondent was not available to meet and bargain for much of the summer. Respondent's General Manager Jay Hennessey was on vacation for the second half of July (Tr. 362-363), that Vic Columbus was on vacation for the first two weeks of August (Tr. 363). Kevin Cruse was on vacation during the last week of August 2010 (Tr. 338). Again, the evidence contradicts Respondent's false claim that the Union avoided bargaining.

Based on the above, the ALJ correctly found that Respondent failed to meet its burden of proving by a preponderance of the evidence that the Union continually delayed or avoided bargaining. Cf., *M & M Contractors*, 262 NLRB 1472 (1982) (over a seven-month period, the union refused to give the employer a date on which it would meet and bargain); *AAA Motor Lines*, 215 NLRB 793 (1974) (the union refused to meet and bargain with the employer regarding

terms for a new contract for over a 2 ½ month period). Accordingly, the ALJ's finding must be upheld.

4. The ALJ Correctly Found That Respondent Failed To That The Union Agreed To Respondent's Schedule Changes And Reduced Scheduled Work Hours

The record fully supports the ALJ's finding that Respondent failed to prove that that the Union agreed to Respondent's proposed schedule changes and reduction of scheduled work hours and to Respondent's implementation of those changes. ALJD p.15, ln. 22-23.

Respondent's claim that the Union agreed to the schedule changes or its implementation on June 20th is outrageous in light of the overwhelmingly contradicted by the credible record evidence, which conclusively shows beyond doubt that the Union never agreed to Respondent's proposed schedule changes. Respondent supports this absurd claim only by resorting to distortions of the record and outright untruths[14]. In the end, however, the testimony of Respondent's own witnesses exposes this assertion as the absurd falsehood that it is.

The record evidence, including mutually corroborative testimony of Cruse, Kologi, Hamilton and O'Donnell, conclusively establishes that the Union never agreed to either Respondent's proposed changes to employees' work schedules and the reduction of scheduled work hours or to the implementation of Respondent's proposed schedule changes (Tr. 74, 247).

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[14] In its brief, Respondent claims that "as part of its scheduling proposal, the Union proposed to increase beeper pay... (Resp. Br. P. 7), and that the Union asked that the increased beeper pay be implemented at the same time as the schedule change" (Resp. Ex. p. 8). It must be noted that Respondent did not cite to any testimony by Cruse or by the E&I techs in support of this claim. Respondent cites only to the coached and self-serving testimony of Columbus (Tr. 409). However, Columbus did not testify to what Respondent represented in its brief. Instead, during direct examination, Respondent's counsel asked Columbus, "did the parties discuss when the changes in beeper pay would be put into effect?" Columbus testified, "yes, to be consistent with the roster change." (Tr. 409). It is clear that Respondent misrepresented Columbus' testimony in its brief. Accordingly, the ALJ correctly found that neither Columbus nor Mays actually testified that the Union agreed to the schedule changes or its implementation. ALJD p. 15, ln. 22-26. Contrary to what Respondent is foisting upon the Board, Columbus did ***not*** testify that the Union requested that the beeper pay be implemented simultaneously with the schedule change.

Respondent also writes in its brief that Respondent "agreed" to implement the change to weekly payroll contemporaneous with the schedule change (Resp. Br. P. 8). What Respondent failed to state is that it "agreed" to so implement only among its own managers. The evidence shows that the Union never agreed to any such implementation. Respondent foolishly imagines that the Board will be deceived by its trickery with words, but Respondent is mistaken. .

In that regard, it is undisputed that Respondent first raised the issue of changing employees' work schedules and reducing their scheduled work hours after the conclusion of the December 16, 2009 bargaining session. (Tr. 286). Cruse testified that when the December bargaining session was over and the parties were getting ready to leave, Columbus told Mark Mays to show the Union the new schedule. Cruse responded by saying that the parties had had a productive meeting, and that it was unprofessional of Respondent to propose the schedule change in this way (Tr. 285). This was corroborated by Kologi and Hamilton (Tr. 57, 246). Cruse testified that he told Columbus that the schedule change was an unfair labor practice[15] (Tr. 286).

The parties discussed Respondent's proposed schedule change at the next bargaining session on January 20, 2010. Kevin Cruse began by asking Respondent questions, including why it wanted the schedule change in the particular way that Respondent had proposed it, but got no clear answers, apart from Columbus stating that Respondent wanted to cut hours (Tr. 287). Cruse testified that there was no discussion during the January meeting regarding a date that Respondent wanted to implement the schedule changes (Tr. 287).

Cruse testified that at the conclusion of the January bargaining session, the schedule change issue was not settled and that the parties were still discussing the matter. (Tr. 288). Cruse testified that the Union did not agree to the schedule change at the January meeting and that Cruse voiced the Union's opposition, including by telling Columbus again that implementing the schedule change would be an unfair labor practice (Tr. 288). Cruse stated that the parties were negotiating a contract and that he wanted to try to get something with which everyone would happy (Tr. 288).

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[15] Respondent argues in its brief that Cruse's testimony that he advised Columbus that the schedule change was an unfair labor practice was not corroborated by Kologi or Hamilton. Resp. Br. p. 31, fn. 35. That corroboration was unnecessary because, as Respondent deliberately ignores, Columbus himself corroborated Cruse. When asked whether Cruse told Columbus that he believed the proposals and implantation to be unfair labor practices, Columbus testified, "Mr. Cruse stated everything that I did nearly in every meeting was an unfair labor practice." (Tr. 412). Columbus then claimed not to have specific recall of whether Cruse said that the roster change was an unfair labor practice. This does not constitute a

During the next bargaining session on February 24th, the Union presented a proposed new schedule for unit employees (Tr. 289). Respondent rejected the Union's proposed schedule. During this meeting, Columbus stated that he wanted to give the electricians ratings. Cruse asked if that would affect their work schedule. Cruse asked, again, for Respondent to explain the reasons that it needed the schedule in the way it was proposed. Cruse asked if the employees could rotate their shifts (Tr. 290) Columbus did not respond to Cruse's questions (Tr. 289-292).

Cruse stated that at the end of the February session, Vic Columbus said that the parties would discuss the proposed schedule change again and that they would exchange ideas (Tr. 292). Cruse testified that at the conclusion of the February 24th meeting, the Union did not agree to Respondent's schedule change (Tr. 292). Cruse testified, again, that he voiced the Union's objection to Respondent's proposed schedule change by telling Columbus, again, that the change would be an unfair labor practice (Tr. 292).

Cruse testified that the parties discussed Respondent's proposed schedule change again at the next bargaining session on April 21st[16]. The discussion focused mainly on certain employees being assigned to particular shifts (Tr. 294). Cruse testified that the Union did not agree to the schedule change and expressed this to Respondent by, among other things, stating that the schedule change would be an unfair labor practice (Tr. 294).

Cruse testified that after the April 21st meeting, he received a phone call from shop steward Darren Kologi, who advised Cruse that unit employees had been given a new, changed schedule. Respondent had not informed the Union of the proposed implementation date of the schedule changes (Tr. 295). Cruse testified that he replied that he would file an unfair labor practice charge (Tr. 295).

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denial by Columbus.

[16] A bargaining session had been scheduled for March, but because Respondent's negotiations with the Union regarding the paper makers ran late, Kologi and Hamilton could not wait, and the meeting did not take place.

Cruse stated that later, on a Friday night, he received a telephone call from Columbus to discuss a different matter. It is undisputed that at the end of their conversation, Cruse asked Columbus to hold off on implementing the schedule change[17] and that Columbus agreed not to implement the change (Tr. 295).

Columbus corroborated that Cruse requested that Respondent not implement the schedule change. In addition, the evidence establishes that by email dated April 30, 2009, from Columbus to Hennessey, Cruz, Mays and Respondent's counsel, Columbus wrote,

> "Kevin Cruse called and ***pleaded*** that we delay the roster change. He has asked for this as a move to demonstrate good faith. He has asked for an off the record meeting between me and him and Santos and Darren to air their concerns.
>
> Each of you give me your thoughts please.
>
> (GC Ex. 73).

Within minutes, Mark Mays responded to Columbus, writing,

> "I would be OK with delaying it until June 7. That is the date that the Shift Mechanics will start their new rotation and on-call coverage." (GC Ex. 73).

Columbus' own testimony – that Cruse "pleaded" that Respondent delay implementing the schedule change – conclusively establishes that the Union did not agree to the proposed changes – and that Respondent intended to go ahead and implement anyway, regardless of whether the parties reached agreement.

It is undisputed that on June 8th, Cruse convened an off the record meeting with Kologi, Hamilton and Vic Columbus at an Applebee's restaurant (Tr. 415). Cruse and the employee witnesses testified, and as Columbus's April 30th email (above) supports, the purpose of this

[17] Respondent states that Cruse asked that the schedule change be delayed until after the parties' off-the record meeting. (Resp. Br. P. 9). However, Columbus' self-serving testimony does not accurately reflect the record evidence. Cruse did not testify that he asked for the schedule change to be held after the off-the-record meeting, only that he asked Respondent to hold off in making the schedule changes (Tr. 296). It is undisputed that during the June 8th off the record meeting at Applebee's Restaurant, the parties did not discuss the schedule change at all. Therefore, Columbus could not have sincerely believed that this off-the record meeting, intended for the parties to clear the air, fulfilled Cruse's request that Respondent not implement the schedule change and reduction in hours.

meeting was so that the parties could air their concerns in the hopes that this would positively impact the bargaining process. It is not disputed, and Respondent admits, that the parties did not discuss Respondent's proposed schedule changes and reductions in hours during the June 8th Applebee's meeting (Tr. 297).

As discussed above, on June 9th, Respondent notified the E&I technicians that Respondent was implementing schedule changes effective June 20th. It is undisputed that the parties did not meet for bargaining between the Union's May request that Respondent not to implement the schedule change and June 20th, when Respondent implemented the changes (Tr. 417).

Respondent also argues that the Union agreed with the implementation of the schedule changes and reduction in scheduled hours, claiming that the Union agreed to the implementation of the schedule changes in exchange for Respondent's agreement on weekly pay and increased beeper pay. As shown below, this argument is completely contradicted by the record evidence and is nothing more than a fabrication concocted to cover up respondent's unfair labor practices.

In support of its argument, Respondent presented the testimony of Columbus. The record shows that Columbus's testimony was devoid of detail as to how or when the Union purportedly agreed to Respondent's implementation of these changes. Columbus's testimony was vague, appeared carefully rehearsed and orchestrated, and was elicited largely through leading questions. Importantly, Columbus's testimony was contradicted by the probative record evidence.

During direct examination, Columbus testified that in November 2009, Respondent made a proposal to change the E&I technicians' schedules and to reduce their scheduled hours from 44 hours to 42 hours (Tr. 402). Columbus testified that the parties discussed Respondent's proposed changes in November and in December 2009, but Columbus provided no testimony as to what he or Kevin Cruse, on behalf of the Union said about the schedule changes (Tr. 405). Columbus testified that at the December 2009 bargaining session, Respondent provided the Union with a spreadsheet that was prepared by Mark Mays that detailed the schedule changes (Tr. 406).

Unlike Cruse, Kologi and Hamilton, Columbus did not testify about the specifics of the parties' discussion after Respondent provided the Union with the schedule change.

Columbus testified that the parties met in January 2010 and discussed scheduling (Tr. 406). Again, Columbus failed to provide any testimony about what Respondent or the Union said about scheduling. In response to leading questions, Columbus testified that at that point, Respondent proposed to implement the schedule change in May 2010 (Tr. 406). Columbus provided no details regarding what he said and what the Union responded regarding the proposed implementation of the schedule change.

Columbus testified that Respondent asked the Union for its "thoughts that they might have with regard to how the schedule might operate if they didn't like the ones that we were preparing." (Tr. 406). Columbus testified that the Union made a counter proposal regarding scheduling, but that Respondent rejected it, thus showing that the Union did not agree with Respondent's proposed schedule changes (Tr. 406-407).

Respondent tried to argue, by insinuation and not by eliciting reliable, probative evidence, that the Union agreed to Respondent's schedule change and reduced scheduled hours *in exchange* for Respondent agreeing to weekly pay and an increase in beeper pay. The ALJ correctly rejected this claim as being unsubstantiated and clearly contradicted by the record evidence[18]. ALJD p. 15, ln. 22-41.

In that regard, Columbus testified that the Union made several proposals regarding beeper pay (Tr. 408), stating that one proposal was four or even more hours. Columbus did not provide any specific testimony regarding when the Union made its proposals or what Respondent said in response to the Union's beeper pay proposals.

[18] Because Respondent had no real evidence to support its fabricated defense, it had to resort to trying to trick witnesses by asking vague and confusing questions. For example, during cross examination, Respondent's counsel asked Darren Kologi whether, "in connection with the schedule change, didn't you ask for an increase in beeper pay." (Tr. 103). Kologi testified that the Union's proposal for increased beeper pay was not in response to the Employer's schedule change (Tr. 105).

Columbus was then asked whether the parties reached agreement on beeper pay. Columbus testified yes, that Respondent agreed to increase beeper pay from one hour to two hours[19] (Tr. 408). Noticeably absent from Columbus's superficial testimony was any detail regarding the important facts establishing when the Union proposed two hours for beeper pay and ***when*** Respondent agreed to it.

Columbus was then asked if the parties discussed when the changes in beeper pay would be put into effect. Columbus testified only, "to be consistent with the roster change." (Tr. 409) Columbus failed to provide any testimony regarding the circumstances surrounding this purported discussion. Columbus's testimony was rehearsed, self-serving and vague. He failed to provide any details regarding what he and Cruse said about implementing the increased beeper pay, or when this alleged discussion took place. Furthermore, Respondent's bargaining notes do not reflect this alleged discussion of implementing increased beeper pay.

Columbus testified that the Union made a proposal that Respondent pay employees' weekly, rather than bi-weekly, and that Respondent agreed to it (Tr. 409-410). Consistent with his entirely vague testimony, it is noteworthy that Columbus did not testify about the critical facts of *when* the Union made that proposal and *when* Respondent agreed to it.

During cross-examination, Columbus displayed a proclivity to try to back pedal or to minimize testimony that he thought was detrimental to Respondents case, as well as trying to avoid answering directly questions that he thought were damaging to Respondent's case. Columbus also testified in a flippant and sarcastic manner.

During cross-examination, Columbus's own testimony completely exposed Respondent's

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[19] Respondent's counsel seems to proffer the untenable argument that because the Union proposed an increase in beeper pay, and because Respondent unilaterally implemented this provision when it implemented its unlawful schedule changes, that this means that the parties "agreed" to the implementation of the increase in beeper pay. This unsupportable argument flies in the face of the meaning and spirit of collective barging negotiations. An increase in beeper pay was one, among many, of the Union's proposals. Just because the Union wanted an increase in beeper pay does not mean that the Union agreed to its implementation at that time, before the parties reached overall impasse. And in fact, Respondent failed to produce any credible, probative evidence that the Union actually consented to Respondent's

claim that the Union agreed to Respondent's schedule change in exchange for the Union's proposal that employees be paid weekly to be an utter fabrication. Columbus admitted that Respondent agreed to the Union's proposal regarding weekly pay (which was in the Union's first proposal) on either the first or second bargaining session, September 28th or 29th 2009[20] (Tr. 426). In a failed effort to back-pedal and minimize the impact of having admitted that Respondent agreed to weekly pay on the first or second bargaining session - and therefore not having anything whatsoever to do with Respondent's schedule change proposals - Columbus then added, "Typically the company and union agree or disagree on numerous things, and those positions can change as bargaining progresses." (Tr. 426).

When asked whether it was true that Respondent never rescinded the agreement it made during the first or second bargaining session to pay employees weekly, Columbus tried to avoid answering, testifying,

A. No. But at the bottom of each sheet, just like the union, there's a little statement that says, 'the company retains the right to modify or delete or change –
Q. ...But, in fact, you didn't actually change – you didn't rescind your agreement to the weekly pay, did you?
A. No, we didn't start it either.
Q. But during the first or second day of bargaining, you agreed to that proposal, didn't you?
A. Yes.
Q. Okay. And that was before any mention of schedule changes, correct?
A. Correct.

(Tr. 426)

With respect to the implementation of these changes to employees' terms and conditions of employment, in a similarly rehearsed, self-serving manner and in response to leading questions, Columbus then testified, vaguely, that during the April 21st bargaining session, "*the idea was* that when we implemented the shift roster change, we would implement the change in the beeper pay and move from biweekly to weekly pay." (Tr. 410). Columbus did not testify as

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implementation of the proposals regarding beeper pay and being paid on a weekly basis.

to what the parties actually said about implementing these changes. Significantly, Respondent presented no probative evidence that this "idea" was ever discussed with the Union or that the Union agreed to it. In fact, the evidence proves the contrary. During cross-examination, when asked what he said during the April 21st bargaining session regarding implementation of schedule changes, Columbus testified, "I can't remember the exact words," nor could he remember what Kevin Cruse said (Tr. 430).

Based on the above, the record evidence fully supports the ALJ's finding that "[t]he fact that Respondent chose to simultaneously implement the Union's beeper/call-in pay proposal cannot in and of itself establish the Union's agreement to the company's proposed schedule dhange and reduction in hours." ALJD p. 15, ln. 37-40. Accordingly, the Judge's finding that Respondent failed to prove that the Union agreed to the implementation of the schedule changes and reduction in work hours must be upheld.

In another carefully rehearsed performance, Mark Mays testified that Respondent agreed to increased beeper pay "when we were negotiating schedule changes." (Tr. 516). However, Mays did not remember when this was. Mays testified that the Employer changed to weekly pay in June, at the time that it implemented its schedule change. Glaringly absent was any testimony by Mays regarding when the parties discussed implementing the changes or what the Union said to establish that the Union agreed to the implementation (Tr. 516).

Although Keelie Cruz and Jay Hennessey attended most, if not all, of the bargaining sessions between September 2009 and June 2010, they were not asked and did not testify about the facts surrounding Respondent's claim that the Union agreed to the schedule changes in exchange for agreement on the Union's beeper pay and weekly pay proposals.

Columbus staunchly tried to avoid answering a simple, fundamental question -whether it was true that the Union did *not* agree to Respondent's proposed schedule change. First claiming not to remember what either he or Cruse said during the April 21st negotiation regarding

Columbus's claim that he announced implementing the changes, Columbus then testified as follows:

> Q. Kevin Cruse didn't agree with your proposed schedule change, did he?
> A. He didn't disagree either.
> Q. But you don't remember what he said? Did he agree, did he say okay, go ahead? He didn't say that did he, or any words to that effect, did he?
> A. No.

(Tr. 431).

Columbus testified that he had provided a timetable for the implementation for schedule changes, beeper pay and weekly pay, that it would be some time in May 2010. There is nothing in Respondent's or the Union's bargaining notes and no email correspondence between the parties that corroborates Columbus's self-serving testimony.

Columbus testified that after the April 21st meeting, Cruse called Columbus and requested that Respondent delay the implantation of the schedule changes until after the parties met again (Tr. 413). During cross-examination, Columbus testified that on April 30th, he sent an email to Hennessey, Cruz and Mays, copied to Respondent's attorney, advising them that Kevin Cruse "pleaded" that Respondent delay the implementation of the schedule change (Tr. 437). Mays replied, stating that he would be OK with delaying the implementation of the schedule changes until June 7th, when Respondent was making changes in the maintenance department (GC Ex. 73).

Again, Columbus tried to avoid answering the obvious question of whether Kevin Cruse's request indicated that the Union did not agree to Respondent's proposed schedule change or to its implementation. Columbus testified,

> A. He was asking me to delay it.
> Q. ...and using the word 'pleaded,' did he plead for other things during the course of bargaining?
> A. No.
> Q. No. He asked for other things, right?
> A. Right.
> Q. So would you agree that your conversation with Mr. Cruse indicated that he did not agree to your implementation of the schedule change?

A. No, he was asking for a delay.
Q. Okay. But a delay means that he did not want you to do it, isn't that correct?
A. I don't know what he meant.
Q. Okay. So your testimony is that you don't know whether him (sp) asking you to delay it means that he did not want you to do it, is that your testimony?
A. No. My testimony is he knew that it was going to happen, and he was requesting me not to do it.

(Tr. 438).

Thus, by Columbus's own admission, Respondent exposed that it fully intended to implement the schedule changes and reduction in scheduled work hours regardless of the Union opposition and without any input from the Union. Respondent's own testimony, along with the preponderance of the credible record evidence, flatly contradicts Respondent's absurd claim that the Union agreed to Respondent's schedule changes and reduction in scheduled hours.

Based on the above, it is clear that the record evidence fully supports the ALJ's finding that Respondent failed to prove that the Union agreed to Respondent's schedule changes and reduction in scheduled work hours, and this finding must be upheld.

C. The Record Evidence and Well-Settled Board Law Overwhelmingly Support The ALJ's Finding That Respondent Violated Section 8(a)(5) Of The Act By Unilaterally Changing Employees' Unexcused Absence Policy, By Prohibiting Employees From Taking Unpaid Days Of Leave, By Requiring Employees To Provide Doctor's Notes For Certain Absences And By Implementing A New Disciplinary Policy

In its Exception No. 8, Respondent claims that the ALJ erred by failing to find that Respondent's June 10, 2010 changes to employees' sick leave and call out policy were privileged and/or de minimus.

Respondent's contentions are frivolous and are contradicted by the record evidence and by well-established Board law. The basis for the Judge's Decision is clearly articulated and supported by the evidence and by relevant Board law and should be upheld.

It is well-established Board law that it is a violation of Section 8(a)(5) of the Act for

employers to unilaterally institute changes regarding matters that are mandatory subjects of bargaining under Section 8(d) of the Act. *NLRB v. Katz*, 369 U.S. 736 (1962). Unilateral changes in mandatory subjects of bargaining are unlawful if it is a "material, substantial and significant change." *Flambeau Airmold Corp.*, 334 NLRB 165 (2001), quoting *Alamo Cement Co.*, 281 NLRB 737, 738 (1986).

It is well-settled Board law that sick leave policy[21] vacations[22], holiday leave,[23] imposing a new rule requiring doctor's notes to document absences[24], and hours of work[25] are mandatory subjects of bargaining, the terms of which Respondent could not lawfully change without notice to or bargaining with the Union. In addition, Respondent's creating new grounds for discipline, as it did in its June 9th memos to employees, constitutes "material, substantial, and significant" unilateral changes from the status quo of employment conditions and is a mandatory subject of bargaining. *Bath Iron Works*, 302 NLRB 898, 902 (1991).

It is clear from the credible record evidence, discussed below, that Respondent unilaterally changed its policies regarding unexcused absences, in violation of Section 8(a)(5) of the Act.

It is undisputed that during the June 10th meeting, Respondent issued to employees a memo captioned "Unexcused Absences," which states, in relevant part,

> All hourly employees are allotted three (3) sick days per year. There are no unpaid excused days off. If an employee has no sick days available he/she will be required to use single vacation days to make up for the absence as long as a

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[21] *Quality Health Services of P.R., Inc. d/b/a Hospital San Cristobal*, 356 NLRB No. 95 (2011).

[22] Vacation scheduling is a mandatory subject of bargaining. See, *Migali Industries*, 285 NLRB 820, 825-826 (1987).

[23] Changing floating holidays is a mandatory subject of bargaining. See, *Legal Aid Bureau*, 319 NLRB 159 (1995).

[24] *Interstate Transport Security/Division of PJR Enterprises, Inc.*, 240 NLRB 274, 279 (1979).

[25] Changing hours of work and work schedules is a mandatory subject of bargaining. See, *Quarto Mining Company*, 296 NLRB 1081 (1989).

sick note is provided. If a sick note is not provided, employees will follow the standard attendance disciplinary process.

Respondent seems to claim that it "set forth" sick leave and call-in policies in its June 10, 2010 memo to E&I employees that were "substantially the same" as policies it maintained in 1998 and 2001 (Resp. brief p. 32). This claim is contradicted by the record evidence, including the corroborative testimony of employee witnesses, the documentary evidence and Respondent's own witnesses.

The evidence establishes that Respondent's June 9th Memo regarding Unexcused Absences changed several of Respondent's long-standing practices including: (1) employees having the choice to use vacation days or unpaid days to cover sick days when employees had exhausted their sick leave; (2) imposing the new requirement that employees provide a doctor's note to document certain absences; and (3) imposing a new disciplinary policy, subjecting employees to discipline for failing to follow any of these new rules and requirements.

Respondent falsely claims that there is "no evidence" that the E&I technicians were permitted to take vacation or unpaid leave, and that they were not required to provide doctor's notes for medical absences, without discipline. Respondent's claim is false, as is established by the mutually corroborative testimony of long-tenured, valued employees Kologi, Hamilton and O'Donnell and by documentary evidence. The testimony establishes testified that prior to June 2010, all throughout the course of their employment, each had used more than three sick days per year. The employees' mutually corroborative testimony establishes that prior to June 9th, upon returning to work after having been out in excess of three sick days, the approved practice was that supervisors gave employees the option of choosing whether they wanted to use a vacation day or take an unpaid day as leave for sick days in excess of the three paid days (Tr. 77, 189-190, 193). This practice was accepted by Respondent's supervisors, and employees were not disciplined for taking unpaid days (Tr. 77).

In this regard, O'Donnell testified with specific details that he was out sick on the Tuesday and Wednesday of Thanksgiving week (he believed it was 2008). O'Donnell testified that when he returned to work the following Monday (as Thursday and Friday were holidays), because he had used his three sick days and vacation days, he took the missed time as unpaid days (Tr. 190-191). O'Donnell further testified that over the years, supervisors, including Tom Butler, Rick Evans and Kevin O'Rourke, routinely asked employees who had exhausted their three paid sick days if they wanted to take a vacation day or an unpaid day (Tr. 191).

Employees' payroll records further establish that prior to June 2010, Respondent permitted employees to take unpaid days if they were out sick for more than the three paid sick days (GC Ex. 26).

The record evidence, including employees' testimony and payroll records, establishes that prior to June 2010, employees were never written up or disciplined in any way for using an unpaid day for sick days in excess of the three paid sick days provided by Respondent (Tr. 77 217, 219-220). Pursuant to Respondent's June 9th Memo, Respondent implemented a new disciplinary policy under which employees would be disciplined for using unpaid leave after exhausting vacation and sick days.

The evidence also establishes that by the June 9th memo, Respondent imposed the new requirement that employees submit a doctor's note if they were out sick in excess of three days. Employees testified that prior to the June 9th memo, they did not provide and were not required to provide a doctor's note, nor were they disciplined for failing to do so (Tr. 190, 194).

The changes to terms and conditions that Respondent implemented on June 9th involved subjects that were raised and over which the parties bargained during negotiations. In that regard, the evidence establishes that the parties exchanged proposals about the number of annual paid sick days (Tr. 81-82). Negotiations concerning the number of paid sick days necessarily implicates the rules and policies regarding what happens to employees who exceed the agreed-upon number of paid sick days. In addition, it is undisputed that Respondent, in its counter

proposal #1, made a proposal to eliminate the practice of allowing employees to use vacation days for sick days when employees had exhausted their sick leave.

Accordingly, under *Bottom Line*, absent overall impasse, Respondent's implementation of new rules regarding the use of vacation and sick leave violated Section 8(a)(5) of the Act.

Alternatively, as the evidence establishes that the changes to terms and conditions set forth in Respondent's Unexcused Absence Memo - eliminating the past practice of employees being free to choose whether to use vacation leave or unpaid leave after having exhausted sick leave, requiring employees to provide doctor's notes and subjecting employees to discipline for failing to follow these new rules – were made without notice to or bargaining with the Union (Tr. 84). Instead, they were presented to employees first, as a fait accompli. Accordingly, by unilaterally implementing these changes, Respondent violated Section 8(a)(5) of the Act. See, *Hospital San Cristobal*, 356 NLRB No. 95 (2011).

Not only did Respondent fail to raise the issue of unexcused absence or sick day procedures during bargaining, but the evidence also establishes that Respondent never gave notice to the Union prior to implementing its policies detailed on its June 9, 2010 memo to employees. The Union first learned of Respondent's changes from employees, who were notified of Respondent's changes terms and conditions of employment regarding call in and sick leave procedures during the June 10th meeting (Tr. 84).

Respondent contends that it did not make any change to its unexcused absence policy and that the "Unexcused Absence" Policy conveyed in the June 9th memo was always in effect. This claim is blatantly false and is contradicted by the record evidence.

That Respondent's claim that it did not make any changes to personnel policies is first exposed as untrue by an email from Mike Austin to Keelie Cruz sent on the morning of June 9th, the day that they conducted the meeting with E&I technicians and distributed the three memos. In the email (GC Ex. 13), Austin wrote:

Morning Keelie, *items that I would like to change in the department.* (emphasis added)

1. When calling out, I would like the employee to have to call me on my cell phone or my phone at home and talk to me. Also they need to call 45 minutes before the shift starts.
2. If and (sic) employee has used all of they (sic) time and call out, they will need to use a vacation day for the call out day.

Thank you,
Michael Austin
E&I Manager

During cross-examination, Keelie Cruz admitted that before her meeting with Austin and the unit employees, Austin requested that Cruz write a memo "with the changes for the call out policy." (Tr. 496). Respondent did not call Mike Austin to testify during the trial. Interestingly, Respondent fails to address in its Exceptions and Brief the undisputed fact that Austin and Cruz drafted this memo of sick leave and call-in policies that Respondent ***wanted to change***. By the plain meaning of its very own words, the only conclusion that can be drawn is Respondent, in fact, changed its sick leave, call-in and disciplinary policies, as set forth in the June 9th memo. Significantly, Austin did not write that he wanted to reiterate or remind employees of Respondent's policies.

Thus, by Respondent's own admission, it can only be concluded that by the June 9th memos to employees, Respondent intended to and did, in fact, change its rules and policies.

Respondent was apparently undaunted by the incontrovertible evidence – by its own admissions - that Respondent changed terms and conditions of employment and by presenting confusing testimony regarding several different versions of its employee handbook, Respondent tried to prove that the Unexcused Absences policy had been in effect. In particular, Respondent claims that a document captioned Unexcused Absences (GC Ex. 7), which Respondent's counsel claimed, but which was never proven by probative evidence, was appended to handbooks distributed to employees in 1999 and 2001, and was always Respondent's unexcused absence policy applied to the E&I technicians. While Respondent might have found this document in its

files when trying to come up with a defense to the unfair labor practice charge, its claim that this was the policy in effect is plainly contradicted by the record evidence.

In that regard, Darren Kologi testified that he had never seen the document that Respondent purported to be its unexcused absence policy prior to the trial (Tr. 80). Kologi further testified that Respondent never issued to him a handbook that contained the attendance policy that it claimed was always in effect (Tr. 137). John O'Donnell testified that Respondent issued to him its 2006 Employee Handbook (Tr. 196). O'Donnell testified without hesitation that Respondent never gave him a subsequent handbook and never gave him any documents to add to or amend the Handbook (Tr. 196-197). O'Donnell further testified, without hesitation, that no supervisor or manager of Respondent ever gave him the "Attendance Policy" (GC Ex. 7) that Respondent claims was the policy that was always in effect at the facility and that he had never seen it before (Tr. 197). Respondent did not present any employee witnesses to testify that Respondent had issued to them what it purported to be its unexcused absence policy.

In support of its claim that Respondent did not change its unexcused absence policy, Respondent presented Keelie Cruz, Respondent's Regional Manager. Cruz, who is responsible for all human resource matters, was hired in February 2008.

Cruz testified that Respondent's call-in policy and attendance policies were not part of Respondent's bound employee handbooks (Tr. 460). The current handbook is the version dated January 1, 2006 (Tr. 460). Respondent introduced into evidence a December 15, 1998 employee handbook (Resp. Ex. 12), with an attendance policy dated January 1, 2001 at the back (Tr. 472).

Cruz admitted that when the employee handbook was revised in 2006, the attendance policy was not made part of the employee handbook, that "it was separate" (Tr. 473). In response to leading questions by Respondent's counsel, Cruz testified, in a contrived manner, that the handbooks and attendance policies are not revised on the same schedule. Cruz failed to testify, however, as to when the handbooks and attendance policies are revised.

Cruz testified that she found an earlier version of an attendance and call-in policy dated 1999 inside another handbook dated 1999 (Tr. 474).

With respect to the unexcused absence policy that Respondent distributed to employees on June 9th, Respondent produced absolutely no probative evidence to establish that this had been the policy and practice and that it was applied to unit employees. Instead, Respondent only elicited the completely self-serving, rehearsed testimony of Cruz in which she stated, after being led by Respondent's counsel, that she "understood" the June 9th memo to be consistent with prior policies (Tr. 479) and that during the time that she has been Respondent's HR Regional Manager, the policy that she distributed on June 9th has been enforced, "as far as I know." (Tr. 479).

During cross-examination, Cruz was a belligerent witness who virtually refused to answer questions directly or forthrightly, even when asked the obvious.

When asked during cross-examination whether it was true that to the extent that there are multiple versions of an employee handbook, that the most current version would be the one that applied to employees, Cruz testified:

A. "not always."
Q. Not always. So is it your testimony then that you could have a handbook from 2009, 2006, 2001, 1999 and 1998, and all of those could apply to employees at the same time..."
A. No, I would say the most recent one applies.
(Tr. 491).

Cruz was obstreperous and went to great lengths to avoid answering whether Respondent had no evidence to prove that the Unit employees had been given the attendance policy that Respondent claims was always in effect:

Q. Okay. And isn't it also a fact that you didn't find anything in any unit employees, E&I technician's personnel files that showed acknowledgment for receipt of this attendance policy, isn't that correct?
A. No.
Q. No?
A. Well, I mean, that was - - I don't believe this was distributed on its own, it's part of the exhibit in the handbook.
Q. Okay, so this policy, this attendance policy that's found in Respondent Exhibit 13 is not distributed on its own, correct?

A. I don't know, I was not here, so I don't - - I mean, as far as the time that I have there, no.
Q. And isn't it a fact that you have absolutely no idea whether this attendance policy was ever given to the E&I technicians? You have no personal knowledge of that, do you?
A. I was not there when they received their handbook.
Q. Thank you. So you had no knowledge, correct?
A. I was not there when they received their handbook.
ALJ: Ma'am, do you know personally whether or not that policy was given to the E&I technicians?
Q. I would say yes since it was a part of the handbook then.
A. ....that's a guess, isn't it?
Q. It's a part of the handbook and they signed for –
ALJ: okay, but ma'am, she's asking you based on what you personally saw and heard.
A. No, I was not there, so I would say no.

(Tr. 493-495).

Respondent would like the Board to believe that it merely issued the June 9th Unexcused Absence Memo to employees to clarify Respondent's policy. This is flatly contradicted by the record evidence.

In support of its flimsy, manufactured defense, Cruz testified that some time in 2009, she did not know precisely when, she reviewed the payroll system and noticed that notations by supervisor Kevin O'Rourke indicating that employees had taken unpaid days (Tr. 484). Cruz testified that she brought this to ORourke's attention and told him that Respondent had no unpaid days, "that there were no unexcused or no absence no pay days, so they would have to follow the –either take a day of or follow the disciplinary process," under which an employee who had no sick days or vacation days available would be disciplined for an absence (Tr. 484). Cruz testified that as far as she knew, Respondent's policy was followed after talking to O'Rourke (Tr. 485)[26].

[26] Even if it were found that Respondent's June 9th unexcused absence policy was not newly implemented but had previously existed, the evidence alternatively demonstrates that Respondent, at a minimum, more stringently applied these personnel rules, which, in and of itself, violates Section 8(a)(5). The Board has held that Respondent's more stringent or more consistent enforcement of attendance or personnel policies that it previously enforced in a sporadic or lax manner constitutes a significant change in mandatory terms and conditions of employment and requires bargaining. See, *United Rentals, Inc.*, 350 NLRB 951, 952 (2007).

Rather than show that Respondent actually had the June 9th unexcused absence policy in effect, Cruz's testimony actually corroborates General Counsel's employee witnesses, who testified that O'Rourke permitted them to take unpaid days when they exhausted their sick leave. Significantly, Respondent failed to call O'Rourke as a witness to corroborate Cruz's testimony or to counter the employees' testimony. Moreover, Respondent failed to offer any explanation or valid reason for failing to call O'Rourke as a witness.

In an effort to show that Respondent had previously required employees to provide doctor's notes, Respondent presented, through Cruz, doctor's notes submitted by John O'Donnell dated January 17, 2001 and September 6, 2000 (Resp. 16 and 17). During cross-examination, Cruz admitted that as O'Donnell submitted these doctor's notes eight years before she began working for Respondent, Cruz had no knowledge of the circumstances under which O'Donnell submitted the notes (Tr. 488). Cruz admitted that she did not know if Respondent had required O'Donnell to provide the doctor's notes or if he brought them in voluntarily (tr. 488). Cruz further admitted that in preparation for the trial, she searched employees' personnel files and was only able to find these two doctor's notes (tr. 495).

While Respondent might have had earlier versions of its handbooks floating around, the evidence establishes that the most recent version of the handbook that employees received was dated 2006[27]. This handbook does not contain the Attendance Policy that Respondent claims was in effect. Moreover, the 2006 Handbook, which Respondent concedes is the most recent version issued to unit employees, states that it supercedes all prior handbooks and any prior inconsistent memos or policies.

Based on the above, it is clear that the Judge correctly found that Respondent failed to prove that it did not unilaterally change sick leave and call-in policies. It is clear that the Judge's

[27] Respondent's counsel offered into evidence a document that Kologi signed acknowledging receipt of a 1998 employee handbook. Respondent's counsel represented that Respondent did not have this handbook, but asserted, not testifying under oath, that this policy has been in effect since the facility opened (Tr. 109-110).

finding is based on probative, credible record evidence, including the testimony of the long-tenured E&I employees, Respondent's June 9th memo to employees, Respondent's internal emails about the change in its policies and the flimsy evidence of a decade old attendance policy that was found inserted into old employee manuals, that Respondent utterly failed to prove was ever distributed to even a single unit employee. Accordingly, the Judge's Decision should be affirmed.

With respect to Respondent's call-out policy, it is undisputed that on June 10, 2010, during the meeting called by Austin, Mays and Cruz, in addition to changing employees' work schedules and reducing their scheduled work hours, Respondent distributed another memo, dated June 9th and entitled Call Out Procedure (GC Ex. 4). Respondent's June 9th call out procedure provides that:

> when calling out, "employees MUST call, at least, forty five (45) minutes prior to the start of their shift." The Memo further provides that, "Employees MUST contact their Supervisor either on his mobile telephone or at his home telephone number. If there is no answer you must leave a message to document your call, however you are still required to keep calling until you have physically spoken to someone. If for some reason you are unable to get in contact with your direct supervisor, please contact the Engineering Manager, if you are unable to reach him then contact the Shift Foreman.

The June 9th Call Out Procedure Memo further provides that, "***effective immediately*** (emphasis added), employees who do not follow the process outlines above will be subject to disciplinary action.

The mutually corroborative testimony of E&I technicians Kologi, Hamilton and O'Donnell clearly establishes that before Respondent implemented the rules and practices outlined in the June 9th Call Out Procedure Memo, Respondent only required that the employees call their supervisor and leave a voice message (Tr. 75, 136, 188). Employees were not required to speak directly to their supervisor, nor were they required to call anyone other than their immediate supervisor (Tr. 76, 188). Employees also testified consistently that prior to the June

9th memo, they were never told by Respondent that they were not permitted to call out by leaving a voice message, nor were they ever disciplined for leaving a voice message instead of speaking directly to the supervisor (Tr. 76, 136, 189)[28].

The documentary and testimonial evidence also establishes that Respondent never made any proposals during bargaining regarding employees' call out procedures (Tr. 82). In fact, the evidence demonstrates that Respondent decided to make this change on June 9th, just before meeting with unit employees, as is established by Mike Austin's email to Keelie Cruz, telling her that the call out procedure was one of the things he wanted to change in the E&I department (GC Ex. 13).

Leave or attendance policies have long been held to be mandatory subjects of bargaining. *Dorsey Trailers, Inc.*, 327 NLRB 835, 852 fn. 26 (1999), enfd. in relevant part 233 F.3d 831 (4th Cir. 2000); *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1016 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983); *Alcoa, Inc.*, 352 NLRB 1222, 1223 (2008). Accordingly, as it is not disputed that Respondent implemented this change without prior notice to or bargaining with the Union, it must be found that Respondent Section 8(a)(5) by implementing this change.

Respondent does not deny that on June 9th, it implemented a change to procedure to be used by employees when they called out of work by now requiring employees to speak to a supervisor or higher level managers directly rather than being permitted to leave a voice message on their supervisor's phones. Instead, Respondent seems to argue that the change to its call out policy set forth in its June 9th memo to employees was a *de minimus* change. Based on the record evidence and well-settled Board law, the ALJ considered and correctly rejected Respondent's argument. ALJD p. 17, ln. 36-40, p. 18, ln. 1-15.

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[28]Pursuant to General Counsel's subpoena served on Respondent, Respondent provided copies of disciplinary warnings and notices issued to unit employees. None of the disciplinary notices produced were for employees leaving a voice message when calling in sick.

First, the mutually corroborative testimony of Kologi, O'Donnell and Hamilton establishes that by having to speak to a supervisor directly, employees often had to stay awake in the early mornings, even when they were ill and needed to be sleeping, in order to be able to reach a supervisor at a reasonable time. For example, if an employee realized in the middle of the night that he was ill, rather than just leave a message for his supervisor and then go to sleep, he had to be sure to awaken in the morning to try to reach the supervisor directly. If an employee who usually awoke at 5am to get ready for work realized he was too ill to go to work, he often had to wait until 7am to reach his supervisor directly.

Significantly, as the June 9th memo makes plain and Respondent does not dispute, as part of the change in the call-out procedure, Respondent implemented a wholly new disciplinary policy. Pursuant to the June 9th memo, employees are now subject to discipline if they violate the policy. The Board has held that an employer's creating new grounds for discipline represents "material, substantial, and significant" unilateral changes from the status quo of employment conditions. *Bath Iron Works*, 302 NLRB 898, 902 (1991).

Respondent did not explicitly except to the Judge's finding that Respondent violated Section 8(a)(5) of the Act by disciplining E&I technician Joe Hamilton for calling out of work on December 27, 2010, when he had no accrued vacation or sick days available (Tr. 239, GC Ex. 29). It is undisputed that Respondent disciplined Hamilton pursuant to its "Unexcused Absence" policy that it unilaterally implemented on June 9, 2010. Because the unilateral implementation of its "Unexcused Absence" policy was unlawful, it is well settled that by disciplining Hamilton pursuant to the unlawful rule, Respondent violated Section 8(a)(5) of the Act. See, *Dynatron/Bondo Corp.*, 324 NLRB 572, 574 (1997).

Respondent also does not seem to except to the Judge's factual finding that both the sick leave and call-in policies set forth in its June 2010 memo to E&I employees explicitly provided for new disciplinary consequences where none had existed before. ALJD p. 18, ln. 10-15. Because Respondent instituted disciplinary consequences regarding employees' sick leave and

call-in procedures, Respondent's Exception No. 8, that the changes to those policies were de minimus, must necessarily be rejected.

Based on the above, the ALJ's finding that Respondent violated Section 8(a)(5) of the Act by implementing its June 9th changes to employees' call-out procedures must be upheld.

D. The Record Evidence and Relevant Board Law Fully Supports the ALJ's Finding That Respondent Violated Section 8(a)(5) Of The Act By Sub-Contracting Out Bargaining Unit Work

In its Exceptions Nos. 4[29], 5, 6, and 7[30], Respondent argues that the Judge erred in finding that Respondent violated Section 8(a)(5) of the Act by unilaterally subcontracting bargaining unit work in June 2010. ALJD p. 21, ln. 33-36. As discussed above, it is unlawful for Respondent to make unilateral changes when the parties are engaged in collective bargaining negotiations "unless and until an overall impasse has been reached on bargaining for the agreement as a whole." *Master Window Cleaning, Inc., d/b/a Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enf'd. 15 F.3d 1087 (9th Cir. 1994); *NLRB v. Katz*, 369 U.S. 736, 742-748 (1962) (holding that an employer violates the act by undertaking unilateral action while the parties are engaged in bargaining for an initial collective bargaining agreement).

The allocation or distribution of bargaining unit work is a term and condition of employment. The Supreme Court has held that an employer has the duty to bargain over a decision to subcontract unit work, which includes the duty to notify and bargain with the union in

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[29] In Exception No. 4, Respondent states that "the ALJ erred in finding that [Respondent] lawfully could not continue its past practice of subcontracting bargaining unit work. (ALJD 21, lines 34-36)." Respondent's exception misstates the Judge's finding. Contrary to what Respondent would like the Board believe, the Judge did not find that Respondent had a past practice of subcontracting unit work in the type and manner that it did in June 2010. To the contrary, the Judge found that Respndent failed to meet its burden of proof of establishing that the work performed by the subcontracted employees (working with motor inventory and repairing and maintaining emergency lighting) was consonant with any previously established past practice. ALJD p. 20, ln 32-46, p. 21, ln. 1-11).

[30] In its Exception N. 7, Respondent argues that the ALJ erred by failing to consider Respondent's use of subcontractors to "audition" new employees, versus using contractors in other manners. Respondent's exception is incorrect and, as it does throughout its exceptions, is confused about the difference between evidence not being considered and, as here, being considered but rejected by the Judge.

advance of making its decision to subcontract. *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203 (1964).

In addition, Board law is clear that Respondent violates Section 8(a)(5) of the Act by unilaterally subcontracting unit work while the parties were engaged in collective bargaining. *Acme Die Casting*, 315 NLRB 202 (1994). In *Acme Die Casting*, the ALJ, affirmed by the Board, noted that cases in which an employer was justified in subcontracting work without notifying the Union in advance involved "instance of subcontracting by employers who have a long and mature bargaining relationship with the unions in their plants..." and further noted that where, as in this case, subcontracting took place during negotiations for an initial contract, the Board and courts "scrutinize bargaining where there is a change in terms of employment during initial contract negotiations, recognizing that such changes can jeopardize the efficacy of a newly certified Union." Id., fn. 21, citing *Central Maine Morning Sentinel*, 295 NLRB 367 (1989).

In this case, Respondent admits that on June 21, 2010, it hired subcontractors, Jisk and Oxford, who employed three employees who performed electrical work at Respondent's facility.

The mutually corroborative testimony of Kologi, Hamilton and O'Donnell establishes that the three subcontractor employees performed work that had always been performed by bargaining unit employees. In that regard, Kologi testified that on June 21st, he observed the three employees performing work on the emergency lights in the facility and motor inventory work, which the undisputed evidence establishes was work that E&I bargaining unit employees performed (Tr. 83). Specifically, Kologi testified that for the last twelve years, the E&I night shift technician Gary Stern performed the emergency light work (Tr. 83) and that Joe Hamilton performed the motor inventory work (Tr. 84).

O'Donnell testified that he observed the new workers performing motor inventory work and repairing and rewiring the emergency lights at the facility. O'Donnell testified that Gary Stern was in charge of the emergency light work at the facility and that Joe Hamilton was responsible for the motor inventory work (Tr. 199-200). During cross-examination, O'Donnell

testified that the Jisk employees were performing motor inventory work that was typically performed by Joe Hamilton (Tr. 206).

The evidence establishes that Respondent did not give notice to the Union that it was going to subcontract bargaining unit work (Tr. 84). In that regard, the uncontradicted testimony of Kevin Cruse establishes that the first that the Union ever learned that Respondent had hired contractors whose employees were performing unit work was on June 21st, when Cruse received a phone call from Darren Kologi (Tr. x, c).

Based on the above, the ALJ's finding that Respondent violated Section 8(a)(5) of the Act by unilaterally subcontracting bargaining unit work must be upheld.

Respondent does not dispute that on June 21st, it subcontracted out bargaining unit work to Jisk and Oxford, and that these employers had three employees performing bargaining unit work.

Respondent raises two defenses. First, Respondent claims that the Union threatened to "poach" all of Respondent's E&I technicians, leaving Respondent without employees, thus creating an emergency which privileged Respondent to protect itself from harm by lining up potential candidates. Next, Respondent contends that this was not a change, but that Respondent has a past practice of using subcontractors' employees as a recruiting tool, evaluating the employee to see if Respondent wanted to hire them. As will be shown below, Respondent's first argument is frivolous and is contradicted by the record evidence. Respondent's second argument is contrary to well-settled Board law.

In support of its claim that Respondent had to subcontract because of an alleged threat by the Union to "poach" Respondent's E&I technicians, Respondent presented the obviously orchestrated testimony of Vic Columbus and Mark Mays.

Columbus testified that after an unrelated arbitration on June 16, 2010, he had a conversation with Kevin Cruse about E&I tech Larry Dobson, who left Respondent's employ *after* Respondent announced its unlawful schedule changes and reduction in hours. Columbus

testified that Cruse said that the E&I technicians were talented and will have no problem getting employment elsewhere, that Cruse was "instrumental in securing a job for Mr. Dobson, and that he would be assisting other E&I technicians in finding positions elsewhere." (Tr. 421). Columbus testified that he replied that if Cruse's "intent was to poach all of our E&I guys and leave us short-handed, that I would have no choice but to go out and employ subcontractors to come in and start the training process to make sure that we weren't short handed." (Tr. 424).

Respondent's claim is a total fabrication. First, Kevin Cruse denies that he made any such threat to Columbus. This is corroborated by Union counsel, Paula Clarity, who was with Cruse for the arbitration (Tr. 538). Next, the ALJ correctly found that "inherently implausible" that the representative of the Union, having been newly certified and negotiating for its first collective bargaining agreement, would pursue a strategy of removing all of its supporters from Respondent's facility and risk the possibility of Respondent hiring new unit employees who did not want to be represented by the Union. ALJD p. 20, ln. 16-20.

Finally, the evidence fully supports the ALJ's finding that even if Cruse said what Columbus attributed to him, Respondent did not really believe that it was in danger of being left without E&I technicians. In that regard, Columbus's testimony exposes that Respondent's claim of a dire emergency was nothing but a sham, fabricated as a pretext to defend against its unlawful unilateral subcontracting of unit work. Columbus admitted that two of the new employees worked only for a few weeks, and that one of the employees, Andre, worked for a month or two (Tr. 447). Columbus admitted that Respondent did not hire any other employees since that time and did not replenish its pool of possible E&I technicians (Tr. 447). Therefore, it can only be concluded that, even had Cruse made the statement, Respondent did not genuinely view the matter to be a serious threat or pose any serious staffing problems for Respondent. Otherwise, Respondent would have asked its contractors for more employees.

Respondent's argument that it had the right to subcontract bargaining unit work because it was a "past practice" is factually and legally incorrect. As Respondent is asserting the

the practice to continue or reoccur on a regular and consistent basis." *Sunoco, Inc.*, 349 NLRB 240, 244 (2007). Respondent failed to meet its burden of proof.

First, the evidence, including the testimony of Mark Mays, establishes that most of Respondent's subcontracting took place in circumstances where there was a great need for increased manpower, such as in monthly and annual shut downs and special projects, such as capital projects (Tr. 502). Thus, Respondent has failed to prove that its subcontracting of routine bargaining unit work on June 21, 2010 was consistent with its prior conduct. See, *Eugene Iovine*, supra.

The employees' testimony also establishes that most of the subcontractors hired by Respondent perform work that is above and beyond the skill level of the E&I technicians, some of which the unit employees might assist with (Tr. 141-143). Kologi, Hamilton and O'Donnell testified that subcontractors are also routinely called in for monthly and annual shutdowns, during which a lot of manpower is needed to perform maintenance on the machines as quickly as possible (Tr. 144, 200).

In addition, the employees testified that the three new contractor employees worked separately from the unit employees and did their work *instead* of the unit employees, in contrast to when they were employed by subcontractors and worked with the E&I technicians, like an apprentice, and were mentored by the E&I technicians (Tr. 201-202).

It is also undisputed, as Mays admitted, that the instances when Respondent hired a contractor to audition its employees for possible future employment with Respondent was before the Union represented the E&I technicians. (Tr. 522).

Most significantly, even if considered in the circumstance of using subcontractor's employees as a recruiting tool, Respondent's witnesses admitted that the decision to subcontract involves Respondent's discretion. In that regard, Mark Mays testified that Respondent uses its discretion to determine when it needs contractors (Tr. 522). Mays further admitted that if Respondent needed to fill an E&I vacancy, Respondent could decide to hire a contractor and

involves Respondent's discretion. In that regard, Mark Mays testified that Respondent uses its discretion to determine when it needs contractors (Tr. 522). Mays further admitted that if Respondent needed to fill an E&I vacancy, Respondent could decide to hire a contractor and audition its employees, or Respondent could decide to hire an employee directly (Tr. 522). Respondent's discretion regarding whether to subcontract to find potential employees is unlimited.

As the Board held in *Eugene Iovine*, "The Board and the courts have consistently held that such discretionary acts are..."precisely the type of action over which an employer must bargain with a newly-certified union." *Id.*, quoting *NLRB v. Katz*, 369 U.S. 746 (1962). Based on the above, it must be concluded that Respondent violated Section 8(a)(5) of the Act by subcontracting bargaining unit employees' work.

Even if Respondent established a past practice, the Board has clearly rejected Respondent's defense that it was privileged to unilaterally subcontract unit work based on its past practice. In *Adair Standish Corp.*, 292 NLRB 890 (1989), enf'd. in relevant part, 9132 F.2d 854 (6th Cir. 1990), the Board, in finding a violation of Section 8(a)(5) wrote:

> The Respondent argues that because of its past practice of instituting economic layoffs due to lack of work, it had no obligation to bargain with the Union over such layoffs. However, because of the intervention of the bargaining representative, the Respondent could no longer continue to unilaterally exercise its discretion with respect to layoffs.

In fact, an established past practice is "...totally immaterial in the presence of a new bargaining agent, which, of course, has never had an opportunity to acquiesce in, or waive its rights to consulted about the Employer's right to take such action unilaterally." *Adair Standish Corp.*, 290 NLRB 317, fn. 50 (1988).

In *Eugene Iovine, Inc.*, 356 NLRB No. 134, fn. 3 (2011), the Board held that the respondent could not establish a past practice defense privileging its unilateral changes (including layoffs) based on the acquiescence of a different union that previously represented the unit

employees, where the new Union had not acquiesced to such unilateral changes. In light of the Board's rejection of an employer's past practice defense to unilateral changes where a prior union had acquiesced and found that Respondent's unilateral layoffs violated Section 8(a)(5) of the Act, it is patently clear that Respondent's past practice defense in the instant case must fail – especially where, as her, the Union is newly certified and has had no opportunity to acquiesce to Respondent's past practices.

Based on the above, the ALJ's finding that Respondent has violated Section 8(a)(5) of the Act by unilaterally subcontracting out bargaining unit work must be upheld.

VIII. CONCLUSION

For all of the reasons set forth above, Counsel for the Acting General Counsel respectfully requests that the Board reject and dismiss each of Respondent's Exceptiona and its Brief. It is further urged that the Board adopt each and every of the Administrative Law Judge's Findings of Fact, Conclusions of Law, Remedy (as amended in the Judge's September 19, 2011, Errata) and Order, and any other remedy deemed just and proper.

Dated at Brooklyn, New York, this December 7, 2011.

Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PRATT INDUSTRIES, INC.,

Respondent,

and **Case Nos.: 29-CA-30271**
29-CA-30281
29-CA-30382

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 30,

Charging Party

Date of Service: December 7, 2011

AFFIDAVIT OF SERVICE OF COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN ANSWER TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by electronic mail upon the following persons, addressed to them at the following addresses:

via NLRB e-filing

The Honorable Lauren Esposito
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Division of Judges
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Subscribed and sworn to me this 7th

Day of December 2011

DESIGNATED AGENT

Tasha V. Frede

NATIONAL LABOR RELATIONS BOARD